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May 29

CONCORD, N.H.

Mr. L. F. Johnson, Maintenance Engineer
Department of Public Works and Highways
State House Annex
Concord, New Hampshire

Dear Mr. Johnson:

You have asked for an opinion concerning jurisdiction of Commissioner of Public Works and Highways to regulate use of the public right-of-way, particularly with reference to maintenance therein of parking areas and of structures for display and sale of merchandise, where, first, the state has title to the land where the right-of-way is located, and, second, where the state has acquired only an easement. It is my opinion that, whether the state has the fee or merely a right-of-way, the Commissioner is authorized to exercise exclusive control over the full width of the right-of-way, insofar as the use thereof affects the public in its right to the use of the land for a highway. The authority of the Commissioner is stated in broad and comprehensive language in R.L., c. 90, Part 10, s. 7, as inserted by Laws of 1945, c. 188 as amended by Laws of 1951, c. 126, s. 1:

"7. Powers. The highway commissioner shall exercise general supervision, control and direction, on behalf of the state, over all matters pertaining to the location, route, alteration, construction, reconstruction, maintenance and discontinuance of highways constructed or maintained wholly or in part by money appropriated from the state treasury, including (a) the method and type of construction and kind and quality of materials to be used; (b) the manner in which such highways shall be maintained; (c) the designation of certain portions of such highways for one-way traffic, upon which vehicles shall proceed in one direction only; (d) the designation of certain portions of such highways from which trucks in excess of a gross weight of twelve thousand pounds shall be excluded, provided, that no such designation shall prevent business operations in connection with stores, factories or any other business or industrial establishments, enterprises or warehouses along said highways; (e) the purchase, planting and maintenance of trees and shrubs for shade, landscaping or prevention of soil erosion; and (f) the location, construction and maintenance of roadside parks."

Mr. L. F. Johnson, Maintenance Engineer

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Where the State does not own the fee in the land occupied by a public right-of-way, the title is subject to the public right-of-way. This entitles the owner to make of the land not improved for actual travel, such use only as is not inconsistent with the needs of the public, such as cutting grass and gathering fruit or other produce from trees growing on the land.

It is my opinion that an abutter has no right to construct and maintain a parking area upon a portion of public right-of-way not used for travel or to construct upon any part of such way any building, fence or other structure, for the display of merchandise or for any other purpose. The Commissioner may remove any and all such obstructions at the expense of the owner, as provided in R.L., c. 90, Part 19, ss. 24 and 26 - 31.

Very truly yours,

Maurice H. Blodgett
Deputy Attorney General

MB/T